UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

AMERICAN BAPTIST HOMES OF THE WEST d/b/a PIEDMONT GARDENS

and **Case Nos.** **32-CA-25247**
32-CA-25248
32-CA-25266
32-CA-25271
through
32-CA-25308
32-CA-25498

SERVICE EMPLOYEES INTERNATIONAL UNION, UNITED HEALTHCARE WORKERS–WEST

COUNSEL FOR THE ACTING GENERAL COUNSEL'S BRIEF IN SUPPORT OF EXCEPTIONS TO THE DECISION AND RECOMMENDED ORDER OF THE ADMINISTRATIVE LAW JUDGE

I. PRELIMINARY STATEMENT

On August 9, 2011, Administrative Law Judge Burton Litvack, herein the ALJ, issued his Decision and Recommended Order in the above-captioned matter wherein he found, among other things, that Piedmont Gardens, herein the Respondent, violated Section 8(a)(1) of the Act by engaging in surveillance and/or creating the impression that it was engaging in surveillance of employees who were engaged in a strike vote and by discriminatorily enforcing its no-access policy by requiring employees who were assisting with the strike vote to leave the facility while allowing off-duty employees on the premises for other purposes, and violated Section 8(a)(1) and (5) of the Act by unlawfully refusing to furnish relevant information regarding striker replacements. The

ALJ's decision in those regards is wholly supported by appropriate findings of fact and conclusions of law.

However, the ALJ either rejected or refused to find that Respondent violated Section 8(a)(1) and (3) of the Act by refusing to reinstate or belatedly reinstating 38 bargaining unit employees who engaged in a strike at Respondent's facility. While the ALJ correctly determined that Respondent relied on unlawful factors in making its decision to permanently replace 38 of its striking employees, specifically, a desire to teach striking employees a lesson and to hire individuals who would cross a picket line in the event of future strikes, the ALJ concluded that, absent evidence that Respondent's decision was calculated to achieve some unlawful purpose that was extrinsic to or unrelated to the strike itself, Respondent's discriminatory motivation for permanently replacing 38 striking employees is irrelevant. Counsel for the Acting General Counsel respectfully submits that while the ALJ's factual findings regarding Respondent's motivations for hiring permanent replacements are wholly supported by the record, the ALJ erred in his legal analysis and in the legal conclusions to be drawn from those facts. Accordingly, pursuant to Section 102.46 of the Board's Rules and Regulations, Counsel for the Acting General Counsel has filed exceptions to the ALJ's decision, and files this brief in support thereof.[1]

II. FACTS PERTAINING TO RESPONDENT'S PERMANENT REPLACEMENT OF 38 STRIKING EMPLOYEES

Respondent, a California nonprofit corporation headquartered in Pleasanton, California, is engaged in the business of operating continuing care and affordable housing

[1] References in this brief to the ALJ's Decision shall be designated by page and line number as follows: ("ALJD [page]:[line]"). References to the record will be designated as follows: Tr. for transcript; GC Exh. for General Counsel Exhibits; R Exh. for Respondent Exhibits; and Jt. Exh. for Joint Exhibits.

communities in California, Arizona, Nevada, and Washington. (ALJD 3:16-19; Tr. 351-52). At its Piedmont Gardens facility in Oakland, California, Respondent provides continuing care to approximately 300 residents who live in three buildings that are separately designated for independent living, assisted living, and skilled nursing care. (ALJD 3:19-22; Tr. 345-46). The facility is run by Executive Director Gayle Reynolds, who is the highest ranking manager at the facility. (ALJD 4:1-4). The Union represents over 100 employees at the Piedmont Gardens facility, who are employed in a variety of classifications including certified nursing assistants, cooks, wait staff, dishwashers, maintenance workers, housekeepers, laundry workers, janitors, and receptionists, among others. (ALJD 4:5-10; Tr. 40, 209; R Exh. 17). The Union's most recent collective-bargaining agreement with Respondent expired on April 30, 2010,[2] and the parties had been engaged in unsuccessful negotiations for a successor contract since February. (Tr. 59, 213-14; R Exh. 17).

On July 9, against a backdrop of stalled contract negotiations and various incidents in which members of the Union's bargaining committee felt that the Respondent had committed unfair labor practices, the Union's bargaining committee unanimously decided to call a 5-day strike. (ALJD 11:20-28; Tr. 107, 117, 235, 563). That same day, Union Nursing Home Division Director Myriam Escamilla delivered a 10-day strike notice to Respondent indicating that the Union intended to commence a strike at the Respondent's facility on August 2, along with a separate letter informing Respondent that the employees unconditionally offered to return to work at or after 5 a.m. on August 7. (ALJD 14:14-24; Tr. 339, 564; GC Exh. 10, 11). The Union went on strike

[2] All dates hereafter refer to 2010.

at Respondent's facility from August 2 through August 7, with at least 80 employees participating in the strike. (ALJD 14:24-26; Tr. 40).

From the beginning of the strike, Respondent was fully staffed with temporary replacement workers.[3] Respondent hired between 60 and 70 temporary employees to substitute for the approximately 80 employees who went on strike, and informed the temporary employees at the time they were hired that the assignment was expected to last for a week. (ALJD 15:21-29; Tr. 330-31). Executive Director Reynolds testified that by the end of the first day of the strike, Respondent was confident that it had enough workers to get through a few days. (ALJD 15:29-30; Tr. 331). Nonetheless, on August 3, the second day of the strike, Respondent began converting the temporary replacements into permanent replacements, and it continued making offers of permanent employment to the temporary replacements every day until August 6. (ALJD 15:32-36; Tr. 336-337). About mid-week, the Union notified Respondent once again that the strikers unconditionally offered to return to work on August 7, and there is no dispute that Respondent received that notice. (ALJD 15 at fn. 37; Tr. 340). Nonetheless, Respondent continued to extend offers of permanent employment to the striker replacements throughout the week.

The decision to permanently replace striking employees was made by Executive Director Reynolds. (ALJD 15:32-33). Although the striking employees had unconditionally offered to return to work on August 7, and although Respondent was fully staffed with temporary workers who were prepared to stay until August 7, Executive Director Reynolds claimed that she was concerned that employees might not come back

[3] Respondent hired a strike management company, Huffmaster, to provide it with temporary workers during the strike. (Tr. 418).

to work at the end of the strike or that employees might go on strike again. (Tr. 330). According to Executive Director Reynolds, another consideration had been the cost of hiring temporary replacements to staff the facility while employees were out on strike. Reynolds admitted, however, that implementing the Union's requests on economic items over the term of a successor collective-bargaining agreement would have cost the Respondent only $250,000, while Respondent spent in excess of $300,000 to hire temporary replacement workers. (Tr. 418, 471-72; ALJD 15:36 – ALJD 16:2 and fn. 41). Reynolds testified that she converted the temporary replacements to permanent replacements because they had demonstrated that they were willing to work during a strike, and she expected that they would be willing to do so again if there was another strike in the future. (ALJD 16:11-16; Tr. 332). While Reynolds knew that it would take time to acclimate the new employees, the "more important" consideration for Reynolds was that she knew that because the replacements were willing to work during this strike, they would be willing to work during any future strikes.[4] (ALJD 16:16-23; Tr. 333).

On the evening of August 6, the final day of the strike, the Union's attorney, Bruce Harland, and the Respondent's attorney, David Durham, spoke over the telephone regarding a rumor that had been circulating among employees that Respondent was planning to lock out the strikers. Durham told Harland that there would be no lockout, but that Respondent would be permanently replacing about 20 employees. (Tr. 201-02). Durham explained that Respondent did not yet have the final number of employees who were being permanently replaced, or their names, because they were still working on it. (Tr. 201). When Harland asked Durham why Respondent was permanently replacing the

[4] Reynolds was evasive on this point in response to questioning by Counsel for the General Counsel, and only admitted the importance of this factor to her decision after Counsel for the General Counsel read to her from her affidavit. (See Tr. 332-333).

employees, as opposed to locking them out, Durham explained that Respondent wanted to "teach the strikers and the Union a lesson," that Respondent "wanted to avoid any future strikes," and that "this was a lesson that they were going to be taught."[5] (Tr. 202-03).

Between August 3 and August 6, Respondent had extended 44 offers of permanent employment to temporary or on-call workers who had been hired as replacements during the strike. (ALJD 15:32-36; Tr. 336-37). However, Respondent did not inform the Union or the striking employees that it had been hiring permanent replacements until the evening of August 6. (ALJD 15 at fn. 38; Tr. 201-02, 340). At the conclusion of the strike, 38 strikers had been permanently replaced. (ALJD 15:20-21; Tr. 212). Thereafter, from October 20 through April 12, 2011, Respondent reinstated 13 of the 38 employees to their former positions of employment. (Jt. Exh. 1; GC Exh. 1 (qqq) ¶10(b); GC Exh. 1(uuu)). Although Respondent has offered positions to other permanently replaced strikers, Respondent concedes that those offers were for positions that are not substantially equivalent.[6] (Tr. 212).

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[5] The ALJ's determination, at ALJD 26:11-14, that Harland was the more veracious witness and that his account of the conversation between he and Durham should be relied upon, should be upheld for the following reasons. Durham's testimony regarding the conversation appeared rehearsed because he testified in narrative form rather than in response to specific questions by counsel. (Tr. 533:3-19). Furthermore, Durham denied telling Harland that Respondent had permanently replaced employees to "teach the employees a lesson," he denied saying that Respondent was replacing employees "to avoid future strikes," and he denied saying that it was "a lesson that needs to be taught." (Tr. 533-34). Durham's denial of those statements undermines his credibility because his denials conflict with Executive Director Reynolds' specific testimony that Respondent hired permanent replacements because it wanted to avoid future strikes. By contrast, Harland's testimony regarding his conversation with Durham is consistent with Respondent's own explanation of its reasons for hiring permanent replacements, and is accordingly more credible than Durham's account.

[6] At the time of the time of the unfair labor practice hearing in this matter, the 25 strikers who had not been reinstated to their former positions of employment, despite making unconditional offers to return to work on August 7, were Sherwin S. Amorsolo, Zegenech Bayou, Maggie Bellinger; Yohanes Beraki, Pacita Bumatay, Marieth Romero Carmona, Calvin Christian, Bonnie Conley,

III. ARGUMENT

A. The ALJ's factual findings, the credited testimony, and the record as a whole offer compelling support for Counsel for the Acting General Counsel's position that Respondent permanently replaced its striking employees with an independent unlawful purpose under *Hot Shoppes*.

The ALJ erred by improperly limiting the scope of the "independent unlawful purpose" exception set forth in *Hot Shoppes, Inc.*[7] While an employer is generally allowed to permanently replace economic strikers for any non-discriminatory reason, it is unlawful under *Hot Shoppes* for an employer to permanently replace such strikers where, as here, the evidence establishes that the employer had an "independent unlawful purpose" for permanently replacing its striking employees, namely, to teach its striking employees a lesson for going on strike and to replace them with individuals less likely to strike. In *Hot Shoppes*, the Board held that it would not evaluate the legitimacy of an employer's object in permanently replacing economic strikers, absent evidence of an unlawful motive.[8] Specifically, the Board stated that "an employer has a legal right to replace economic strikers at will," and "the motive for such replacements is immaterial, absent evidence of an independent unlawful purpose."[9]

Judith Coston, Besima Ferhatovic, Sanjannete Fowler, Elisa Haile, Keiyana Kemp, Johnny Lee, Salvador Miranda, Michael Morrow, Sheila Nelson, Janie Ragsdale, Michelle Reynolds, Yordanos Sega, Palwinder Singh, Denesha Singleton, Carmen Smith, Pierre Williams and Rosa Zelaya. (Jt. Exh. 1; GC Exh. 1(qqq) ¶10(a)).

[7] 146 NLRB 802, 805 (1964). The Board relied upon *NLRB v. Mackay Radio & Telegraph Co.*, 304 U.S. 333, 345 (1938), in which the Supreme Court, in dictum, articulated its view that an employer may lawfully permanently replace economic strikers "in an effort to carry on the business."

[8] 146 NLRB at 805.

[9] 146 NLRB at 805. With regard to "evidence of an independent unlawful purpose," the Board cited *Cone Brothers Contracting Co.*, 135 NLRB 108 (1962), enfd. 317 F.2d 3 (5th Cir. 1963), cert. denied 375 U.S. 945 (1963). In *Cone Brothers*, an employer was found to have violated Section 8(a)(3) by engaging in a "scheme" whereby it sent employees to another employer's facility which was being picketed and took advantage of the employees' refusal to cross the picket line to rid itself of union supporters. 135 NLRB at 109, 139-141.

Thus, under *Hot Shoppes*, an employer does not have to prove the business necessity of its hiring of permanent replacements, or show a nexus between that hiring and the ability to continue operations during the strike. Rather, it is the General Counsel's burden to prove that the employer permanently replaced strikers because of a prohibited motive. In other words, an employer is free to hire permanent replacements for any non-discriminatory reason, but where anti-union discrimination is shown in the use of permanent replacements, a Section 8(a)(3) violation is established. This is consistent with the employment-at-will doctrine alluded to by the Board in *Hot Shoppes*.[10] Under that doctrine, an employee "may be fired for any reason or no reason at all, so long as the discharge does not violate clearly mandated public policy."[11]

The Board's decisions in *Avery Heights*[12] reaffirmed that, while an employer is free to hire permanent replacements for any non-discriminatory reason, a Section 8(a)(3) violation is established where anti-union discrimination is shown to be the purpose of the permanent replacement.[13] In the relevant portion of its initial decision, the Board held that the General Counsel had not proven an unlawful motive for the permanent replacement of economic strikers, stating, importantly, "The evidence in this case . . . simply does not establish some kind of a nefarious scheme to punish striking employees by hiring permanent replacements."[14] In *Avery Heights*, unlike here, no evidence was offered of any employer statements indicating anti-union animus, and the Board concluded that the other evidence presented did not establish such an object. Therefore,

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[10] 146 NLRB at 805 (an "employer has a legal right to replace economic strikers at will").
[11] *Acuff v. IBP, Inc.*, 65 F.Supp.2d 866, 868 (C.D.Ill. 1999).
[12] 343 NLRB 1301, 1305-1308 (2004), vacated and remanded *sub nom. New England Health Care Employees Union v. NLRB*, 448 F.3d 189 (2d Cir. 2006), on remand 350 NLRB 214 (2007), enfd. 303 Fed.Appx. 998 (2d Cir. 2008), cert. denied ___ U.S. ___, 130 S.Ct. 393 (2009).
[13] *Id.*, 343 NLRB at 1305.
[14] *Id.*, at 1307.

the Board held that the General Counsel had failed to meet the evidentiary burden of establishing an unlawful motive under *Hot Shoppes*.

The Second Circuit rejected the Board's factual determination, finding that there was "no apparent basis" for the Board majority's conclusion.[15] The court remanded the case to the Board to consider whether "substantial evidence" supported the Board's conclusion. Significantly, the Second Circuit did not make any legal conclusions as to the *Hot Shoppes* exception – indeed, it emphasized the narrow scope of its decision and expressly stated that it was not imposing its view of the law on the Board: "[s]ince we do not decide whether substantial evidence supported the Board's conclusion that the Union failed to carry its burden of demonstrating an independent unlawful purpose, this opinion does not preclude the Board on remand from reaching that same conclusion through adequate reasoning."[16]

On remand, the Board accepted the view of the facts suggested by the Second Circuit -- i.e., that the evidence indicated an illicit motive -- as the law of the case.[17] The Board noted that its initial decision had been based on a contrary factual finding,[18] and acknowledged that the only aspect of the court's remand that it accepted as the law of the case was its suggested view of the facts.[19] Based on this changed factual finding, the Board held that the employer had violated Section 8(a)(3) by failing to reinstate the

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[15] *New England Health Care Employees Union v. NLRB*, 448 F.3d 189, 196 (2d Cir. 2006).
[16] *Ibid.*
[17] *Avery Heights*, 350 NLRB 214, 215 (2007).
[18] *Id.*, at 214 ("[i]n particular, the Board found that the Respondent's failure to disclose the hiring of permanent replacements was not evidence of an illicit motive").
[19] *Id.*, at 215-16 ("[w]e have accepted the court's remand, and recognize -- as the law of the case -- the court's finding that the logical implication of the Respondent's secrecy was an illicit motive. Having reviewed the record, including the facts highlighted by the court, we find that the record is insufficient to refute the inferred unlawful motive").

permanently replaced economic strikers.[20] As noted above, the Second Circuit's decision did not change the Board's *Hot Shoppes* legal standard in any way; the Board only relied on the Second Circuit's decision for its factual findings. Thus, on remand, and consistent with the general discussion in its initial *Avery Heights* decision, the Board's finding of a violation on remand was necessarily based on the conclusion that an employer violates Section 8(a)(3) by refusing to reinstate permanently replaced economic strikers where deciding to do so was motivated by unlawful anti-union animus, discrimination, and/or retaliation.

Counsel for the Acting General Counsel notes that, in its original decision in *Avery Heights*, the Board also indicated that permanent replacement could be used as a lawful "economic weapon" to counteract a union's strike.[21] This statement should not be read so broadly as to eviscerate the *Hot Shoppes* principle which the Board endorsed there[22] and reaffirmed in finding a violation on remand.[23] To be sure, permanent replacement is a legitimate economic weapon in the sense that it enables an employer to withstand a strike by continuing operations and thereby gain an advantage at the bargaining table. Any suggestion that employing permanent replacements for the purpose of removing strikers from the workplace or to chill employees from striking in the future is a legitimate use of this economic weapon, however, is clearly inconsistent with well-established and long-standing Board law. As discussed above, while an employer is free to permanently replace economic strikers for any non-discriminatory

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[20] *Id.*, at 217.
[21] 343 NLRB at 1307-1308.
[22] *Id.*, at 1305.
[23] 350 NLRB at 217.

reason, it may not do so in retaliation for employees' exercise of their protected right to strike, or to interfere with their exercise of that right in the future.

Here, the record contains compelling evidence of Respondent's unlawful motive. As the ALJ correctly found, Respondent's decision to hire permanent replacements was motivated by its desire to punish its striking bargaining unit employees and to hire individuals who would cross a picket line in the event of future strikes. Thus, Respondent's attorney told the Union's attorney that it had permanently replaced the striking employees because it wanted to teach the strikers and the Union a lesson and it wanted to avoid any future strikes. (ALJD 16:38-41, ALJD 26:11-20). Consistent with that statement, Respondent's Executive Director Gayle Reynolds admitted that the "more important" consideration for her in hiring permanent replacements was that they had demonstrated that they would not participate in a future strike. (ALJD 26:22-25). Those statements clearly demonstrate Respondent's illicit motive of punishing the strikers for their protected activity and undermining the Union's status as bargaining representative. Such retaliatory and unlawful objects, explicitly along Section 7 lines, constitute the essence of unlawful discrimination.[24] Accordingly, Counsel for the Acting General Counsel respectfully urges the Board to find that the ALJ erred in failing to conclude that

[24] Compare *Planned Building Services*, 347 NLRB 670, 708 (2006) (adopting judge's finding that successor employer's refusal to hire incumbent employees was unlawfully motivated; unlawful motivation was established in part by employer's testimony that it was very concerned about previous picketing and that if incumbent employees were hired they would go out on strike); *National Fabricators*, 295 NLRB 1095, 1095-1096 (1989), enfd. 903 F.2d 396 (5th Cir. 1990), cert. denied 498 U.S. 1024 (1991) ("we think it clear beyond peradventure that the criterion used by the Respondent to select employees for layoff -- disfavoring employees who were likely to engage in protected union activities -- is the kind of coercive discrimination that naturally tends to discourage unionization and other concerted activity").

the Respondent's conduct demonstrates an "independent unlawful purpose," as set forth in *Hot Shoppes*.[25]

B. <u>Even assuming that Respondent's hiring of permanent replacements must have been calculated to achieve an unlawful purpose that was unrelated to the strike, the evidence demonstrates that Respondent possessed such an unlawful goal</u>.

Even under the ALJ's strained interpretation of *Hot Shoppes* -- i.e., that an employer's unlawful motive for permanently replacing striking employees is irrelevant unless the employer is seeking to accomplish an unlawful purpose unrelated to or extraneous to the strike itself -- Respondent's conduct here meets that standard. Thus, Respondent's Executive Director and its attorney expressly stated that in converting the status of strike replacement employees from temporary to permanent and permanently replacing the strikers, they intended not only to retaliate against employees for having

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[25] The ALJ is further mistaken in attempting to find support for his interpretation of *Hot Shoppes* in *Choctaw Maid Farms*, 308 NLRB 521, 528 (1992). In that case, the ALJ explicitly rejected the General Counsel's claim that the employer had a discriminatory motive for hiring an excess number of permanent replacements, concluding that the relative inexperience of replacements justified the higher numbers. In such circumstances, the ALJ's statement there that the employer's state of mind in replacing the strikers is "irrelevant" is no more than a statement of the employment-at-will doctrine noted in *Hot Shoppes*. In any event, the ALJ's reliance here on *Choctaw Maid Farms* ignores the number of other decisions that have found replacement of strikers to be unlawfully motivated under *Hot Shoppes*. See *Nicholas County Health Care Center*, 331 NLRB 970, 990-991 (2000), enfd. 13 Fed. Appx 1 (D.C. Cir. 2001) (employer unlawfully "used [employees'] participation in the strike as a means of ridding itself of certain employees who were union supporters and punishing others by recalling them to part time positions or to different shifts"); *Pennsylvania Glass Sand Corp.*, 172 NLRB 514, 535 (1968), enfd. in pertinent part 427 F.2d 582 (D.C. Cir. 1970) (trial examiner "did not read *Hot Shoppes* as giving employers carte blanche to replace economic strikers under all circumstances and by any means they desire"); *Bernard Dalsin Manufacturing Co.*, Case 18-CA-18797, JD-27-09, ALJD slip op. at 29, WL 1886693 (2009) ("[g]iven that Respondent had a stable source of temporary employees with no referral fee . . . I have concluded the reasons advanced . . . for Respondent's hasty hiring of permanent replacements were pretextual, and that Respondent's actions were taken for the unlawful purpose of retaliating against the strikers"). The Board did not address the *Hot Shoppes* allegation in either *Nicholas County Health Care Center* or *Pennsylvania Glass Sand*, as the Board in each of those cases based its holding on the alternate finding that the strike was an unfair labor practice strike. No exceptions were filed to the ALJD in *Bernard Dalsin*, and the ALJD was adopted pro forma.

participated in the strike, but also to forestall and interfere with future strikes by permanently replacing strikers with replacement employees who would be willing to work during any future strike.

The Board has made it clear that an employer violates Section 8(a)(3) not only by retaliating against employees for having engaged in strike activity,[26] but also by conduct designed to forestall employees from exercising their right to strike in the future.[27] Indeed, the Board has aptly compared an employer's actions to prevent future protected activity to the erection of "a dam at the source of supply of potential, protected activity," and reasoned that, "the suppression of future protected activity is exactly what lies at the heart of most unlawful retaliation against past protected activity."[28]

Here, the ALJ appropriately concluded that Respondent permanently replaced the striking employees in order to hire individuals who would cross a picket line in the event of future strikes. He erred, however, in finding that a basis for dismissal. Respondent's objective to forestall any future strike activity was not directly related to its bargaining unit employees' August 2 through 7 economic strike, but was instead clearly intended to accomplish another unlawful purpose unrelated to or extraneous to that strike, namely suppressing employees' future strike activity. Accordingly, even under the ALJ's

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[26] See *Capehorn Industry*, 336 NLRB 364, 365-67 (2001) (employer violated Section 8(a)(3) by failing to immediately reinstate strikers upon unconditional offer to return to work where there was no legitimate business justification for entering into a permanent subcontract).

[27] See *Century Air Freight*, 284 NLRB 730, 732 (1987) (employer violated Section 8(a)(3) by permanently subcontracting unit work and discharging unit employees in order to forestall the exercise of their right to strike); *Westpac Electric*, 321 NLRB 1322, 1374 (1996) (employer violated Section 8(a)(3) by isolating employee in retaliation for his previous striking activities and also in anticipation that he would participate in a strike in the future).

[28] See *Parexel International, LLC*, 356 NLRB No. 82, slip op. at 4 and cases cited therein (2011) (employer violated Section 8(a)(1) by discharging an employee to prevent her from discussing wages with other employees).

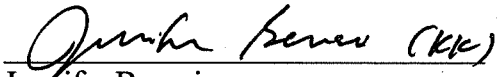
interpretation of *Hot Shoppes*, Respondent's permanent replacement of bargaining unit employees clearly violated Section 8(a)(3) of the Act.

III. CONCLUSION

For the reasons set forth above, it is respectfully requested that the Board find merit to Counsel for the Acting General Counsel's exceptions and find that Respondent violated Section 8(a)(1) and (3) of the Act by refusing to reinstate or belatedly reinstating 38 of its bargaining unit employees, and that the Board remedy Respondent's unlawful conduct by ordering Respondent to offer reinstatement to its permanently replaced employees and make them whole for any loss of earnings or other benefits that were suffered as a result of Respondent's unlawful discrimination against them.

DATED AT Oakland, California this 20th day of September, 2011.

Respectfully submitted,



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FORM NLRB-877

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

AMERICAN BAPTIST HOMES OF THE WEST d/b/a PIEDMONT GARDENS **and** **SERVICE EMPLOYEES INTERNATIONAL UNION, UNITED HEALTHCARE WORKERS - WEST**	**Case(s) 32-CA-25247** **32-CA-25248** **32-CA-25266** **32-CA-25271** **through** **32-CA-25308** **32-CA-25498** **DATE OF MAILING: September 20, 2011**

AFFIDAVIT OF SERVICE FOR THE COUNSEL FOR THE ACTING GENERAL COUNSEL'S BRIEF IN SUPPORT OF EXCEPTIONS TO THE DECISION AND RECOMMENDED ORDER OF THE ADMINISTRATIVE LAW JUDGE

I, the undersigned employee of the National Labor Relations Board, being duly sworn, depose and say that on the date indicated above I served the above-entitled document(s) by postpaid mail upon the following persons, addressed to them at the following addresses:

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Subscribed and sworn to before me this 20th day of August 2011.	DESIGNATED AGENT /s/ Shirley M. Owens **NATIONAL LABOR RELATIONS BOARD**

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COUNSEL FOR THE ACTING GENERAL COUNSEL'S EXCEPTIONS TO THE DECISION AND RECOMMENDED ORDER OF THE ADMINISTRATIVE LAW JUDGE

Pursuant to Section 102.46 of the Rules and Regulations of the National Labor Relations Board (herein the Board), Counsel for the Acting General Counsel hereby files the following exceptions to certain findings and conclusions of law, to the failure to make certain findings and to draw certain legal conclusions, and to the recommended order of the Administrative Law Judge (herein the ALJ), as set forth in his Decision and Order dated August 9, 2011:[1]

1. The conclusion that Respondent's hiring of permanent replacements was not unlawful under the "independent unlawful purpose" exception as set forth by the Board in *Hot Shoppes Inc.,* 146 NLRB 802 (1964), because Respondent's hiring of permanent replacements must have been calculated to accomplish an unlawful purpose which

[1] References in these Exceptions to the Decision shall be designated by page and line number as follows: ("ALJD [page]:[line]").

was unrelated to or extrinsic to the strike itself in order to be unlawful. (ALJD 26:29 – ALJD 27:10).

2. The ALJ's reliance on *Choctaw Maid Farms,* 308 NLRB 521 (1992), and his conclusion that an employer's state of mind in hiring permanent replacements for striking employees is irrelevant, whatever factors, lawful or unlawful, contributed to that decision, unless the decision was calculated to accomplish an unlawful purpose that was extraneous to the strike itself. (ALJD 27:11-22).
3. The finding that Respondent did not violate Section 8(a)(1) and (3) of the Act by failing and refusing to reinstate 25 of its bargaining unit employees. (ALJD 27:22-26).
4. The failure to conclude that Respondent's desire to teach its striking employees a lesson and to replace them with individuals who would cross a picket line in the event of future strikes demonstrated that Respondent had an independent unlawful purpose for permanently replacing 38 of its bargaining unit employees. (ALJD 25:15 – ALJD 27:26).
5. The failure to find that, even assuming Respondent's hiring of permanent replacements must have been calculated to establish some unlawful purpose that was extrinsic to the strike in order for Respondent's actions to have been unlawful, Respondent possessed such an extrinsic unlawful purpose here. (ALJD 25:15 – ALJD 27:26).
6. The failure to find that Respondent violated Section 8(a)(1) and (3) of the Act by failing and refusing to reinstate, and/or by belatedly reinstating, 38 of its bargaining unit employees. (ALJD 25:15 – ALJD 27:26; ALJD 29:7-31).

7. The failure to recommend that Respondent be ordered to reinstate its 38 permanently replaced bargaining unit employees, to the extent that it has not already done so, and/or make them whole for any loss of earnings or other benefits suffered as a result of the Respondent's unlawful discrimination against them. (ALJD 29:35 – ALJD 31:4).

8. The recommendation to dismiss the complaint allegation that Respondent violated Section 8(a)(1) and (3) of the Act by belatedly reinstating or refusing to reinstate former striking employees. (ALJD 31:1-4).

DATED AT Oakland, California this 20th day of September, 2011.

Respectfully submitted,

Jennifer Benesis (/ccs)

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AFFIDAVIT OF SERVICE FOR THE ACTING GENERAL COUNSEL'S EXCEPTIONS TO THE DECISION AND RECOMMENDED ORDER OF THE ADMINISTRATIVE LAW JUDGE

I, the undersigned employee of the National Labor Relations Board, being duly sworn, depose and say that on the date indicated above I served the above-entitled document(s) by postpaid mail upon the following persons, addressed to them at the following addresses:

Mr. Les Heltzer, Executive Secretary
National Labor Relations Board
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Subscribed and sworn to before me this 20th day of August 2011.	DESIGNATED AGENT /s/ Shirley M. Owens **NATIONAL LABOR RELATIONS BOARD**